SUPREME COURT, U. S.
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No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1968

THOMAS KAPATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty of theft of jewelry from an interstate shipment, in violation of 18 U.S.C. 659. On October 28, 1966, petitioner was sentenced to imprisonment for 7½ years. The court of appeals affirmed, and this Court denied a petition for a writ of certiorari. 389 U.S. 836.

Thereafter, petitioner filed a combined motion for a new trial on the ground of newly discovered evidence and for vacation of sentence pursuant to 28 U.S.C. 2255, supported by affidavits (R. 707–718). After oral argument, the district court denied the

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motion in all respects (R. 767–772; Pet. App. 1–3). On April 23, 1968, the court of appeals affirmed without opinion (R. 827).

The evidence at the original trial resulting in petitioner's conviction is set forth at pp. 2–4 of the government's memorandum in opposition in *Kapatos* v. *United States*, No. 166, O.T. 1967, certiorari denied, 389 U.S. 836. That evidence, insofar as it is here pertinent, showed that an automobile containing two men dressed as policemen overtook the station wagon of the AAA Jewelry Messenger Service. The messengers were ordered out of the station wagon and into a panel truck by the "policeman" who had been a passenger in the automobile and who had directed the station wagon to stop. Four messengers identified petitioner as that "policeman." They did not see petitioner or the station wagon depart. One Mullett testified that he was in an automobile near the place of the robbery and that a "policeman"—one who had red hair and was not petitioner—asked for help in operating a stick shift. The "policeman" led Mullett to the AAA station wagon. When the "policeman" still could not operate the car, he departed on foot. Three defense witnesses also testified to the same effect.

In support of the instant motion, petitioner offered the affidavit of John T. Joyce. It alleged that, while working on a demolition project on the day of the robbery, he saw the black sedan and the station wagon. The "cop" with red hair who tried to drive off with the station wagon was the same "cop" who had earlier emerged from the sedan, approached the station wagon

and ordered the messengers out. Joyce alleged further that he had given a statement "regarding this" to the F.B.I. about November 12, 1963 (R. 718–719).

Mr. Lopez, petitioner's counsel, alleged in his affidavit that he did not know that John T. Joyce was a potential witness and "never spoke to him until after the judgment of conviction" (R. 712–713). The government, before trial, had given Mr. Lopez the names of eight persons whom the government did not intend to call as witnesses, but who might "have information which you may determine to be pertinent to your client's defense" (R. 729, 739). This list did not include the name John T. Joyce, but did include his brother, James P. Joyce (R. 714–715).

The government's answering affidavit alleged that the attorney had sent the letter naming the eight witnesses after reviewing F.B.I. reports of interviews of over 150 persons. It represented an effort to apprise defense counsel of all eyewitnesses known to the government (other than the messengers). The failure to include John T. Joyce's name was inadvertent (R. 728–730).[1] The affidavit stated that, after Mr. Lopez had been retained as petitioner's counsel, some three or four months prior to trial, he discussed with government counsel a Life Magazine article regarding the hijacking. The article showed that the Joyce brothers were eyewitnesses on a hill "four-and-a-half stories above the lot, with a clear view of 41st Street," and had subsequently looted the abandoned station wagon (R.

[1] The reports as to statements by James and John Joyce were identical in appearance and contained the same information.

735–736, 740).* A supplementary affidavit by government counsel alleged that, pursuant to subpoena, Mr. Lopez received during the trial New York City Police Department reports relating to its investigation, which included a report of the Department's interview of John T. Joyce showing that he had witnessed the hijacking (R. 742–744).

At the hearing on the motion, Mr. Lopez acknowledged that, prior to trial, he had read the Life article mentioning John T. Joyce (R. 792). He also stated that he had seen John T. Joyce's name on the New York Police Department record turned over to him during the trial (R. 793). Mr. Lopez also acknowledged that, although he had obtained from the government's letter the name and address of James P. Joyce, he did not interview him (R. 790).

The district court properly overruled the motion for a new trial and to vacate sentence. There was no suppression of evidence as in the cases relied upon by petitioner. The government gave counsel the name of James P. Joyce whose recollection was the same as John's (see R. 728, 789, 803). Moreover petitioner knew before trial that there were in fact two Joyce brothers who witnessed the incident.

Petitioner argues that there was no reason for him to interview Joyce who, although he could observe the movement of all involved, could not see the faces (Pet. 13). He claims that Joyce's statement to the New York police did not indicate that the policeman-

* Both Joyce brothers were convicted of receiving stolen property (Pet. App. 2).

bandit who originally alighted from the truck and the policeman-bandit who tried to start the station wagon were the same man, and that not until the government invented the theory of a "switch" by the two policemen was there any reason to believe that the Joyce testimony would be relevant (Pet. 12–13). The statement to the New York police, however, in referring to "one male dressed in blue uniform with gun in hand" and later to "a man dressed in what appeared to be a police uniform" (R. 744), did not exclude the possibility that these referred to the same "policeman." Moreover, the Life article itself reported the participation of two men dressed as policemen. The government attorney said in his opening statement that the evidence would show that petitioner was the policeman who ordered the station wagon to stop, but that it was the other policeman who was unsuccessful in attempting to drive away the station wagon (R. 13).

Petitioner did not thereafter claim surprise or move for a continuance. There was explicit testimony at the trial by the messenger, Kriesman, that two of the bandits were dressed as policemen (R. 32). The tenor of the testimony of defense witnesses was that only one policeman was involved and that he was not the petitioner. Thus, as the trial judge found, not only was there no deliberate suppression by the government, but there is no reason to believe that the newly proffered testimony would have affected the verdict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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